



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 9, 1997

Mr. Patrick S. Dohoney
Assistant District Attorney
Tarrant County
Office of the Criminal District Attorney
Justice Center
401 West Belknap
Fort Worth, Texas 76196-0201

OR97-0036

Dear Mr. Dohoney:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 102899.

The Tarrant County District Attorney's Office (the "county") received a request for an audio tape pertaining to the county's investigation of an allegation of sexual harassment. The requestor is the person accused of the alleged harassment. The tape contains a recording of a conversation between the alleged harasser and another individual who asks him about the allegations. You assert that the tape is excepted from required public disclosure based on Government Code sections 552.101, 552.103 and 552.107.

Section 552.101 excepts from public disclosure information that is confidential by law. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.*

The tape contains information that identifies a victim of alleged sexual harassment. This information is private information that is protected from public disclosure under the common-law right to privacy. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso

1992, writ denied) Consequently, based on section 552.101 of the Government Code in conjunction with the common-law right to privacy, the county must withhold from disclosure the information in the tape that identifies the victim of the alleged sexual harassment.

Section 552.103(a) of the Government Code reads as follows:

(A) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

You state:

The audio cassette tape sought by Requestor is directly implicated in anticipated administrative litigation and is clearly relevant to the anticipated administrative litigation. . . . Captain Pat Byrnes, who is the individual investigating the allegations of sexual harassment made against Requestor, strenuously objects to the production of the information in this case, and he will continue to do so. . . . To disclose the audio cassette tape sought by the Requestor would compromise the position of the Department.

Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. *See* Open Records Decision No. 518 (1989). We do not believe the county has established that litigation is reasonably anticipated in this case. Consequently, the county may not withhold the requested information from disclosure based on Government Code section 552.103.

Section 552.107(1) states that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

This exception applies to information that reveals attorney advice and opinion or client confidences. *See* Open Records Decision No. 574 (1990). You have not established that the recorded conversation is an attorney-client communication. Consequently, the county may not withhold the tape from the requestor based on Government Code section 552.107(1).

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/rho

Ref.: ID# 102899

Enclosures: Submitted tape

cc: Sergeant Vincent Cole
Tarrant County
Justice Center
401 West Belknap
Fort Worth, Texas 76196-0201
(w/o enclosures)